

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MADISON MECHANICAL, INC.,

Plaintiff,

v.

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION,**

Defendant.

**Civil Action No. 99-2854
(EGS/JMF)**

REPORT AND RECOMMENDATION

This case was referred to me by Judge Sullivan pursuant to LCvR 72.3(a)(5) for a report and recommendation on NASA's Motion to Dismiss, Or Alternatively, For Summary Judgment and on Madison Mechanical's Cross Motion for Summary Judgment. Plaintiff brings this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552 (1994), seeking the release of portions of documents withheld by the Goddard Space Flight Center in Greenbelt, MD. The documents at issue fall into four categories: (1) price proposal memoranda, (2) pricing transmittals of detailed cost estimates, (3) proposal/modification review sheets, and (4) planning and evaluation memoranda. For the reasons set forth below, I will recommend that defendant's motion to dismiss, or in the alternative, for summary judgment, and plaintiff's cross motion for summary judgment thereto, both be denied.

FACTS

There is no genuine issue as to the following facts:

1. NASA awarded Brown & Root ("B&R") contract no. NAS5-35157, a fixed price, indefinite

- quantity, award fee construction contract for minor construction, modification, and rehabilitation for the Goddard Space Flight Center. D's Exhibit 1. Pursuant to the terms of the contract, B&R would provide all management, supervision, labor, materials, tools, and equipment necessary for the performance of the contract. The contract further required B&R to provide the construction services on an "as-needed" basis in response to the delivery orders. Id.
2. Pursuant to the contract, B&R was required to submit a price proposal to the government for each potential delivery order. D's Exhibit 1 at B.1, F.3.
 3. Section F.3 of the contract specified that the basis for the contractor's proposal would be the prices published by the R.S. Means Company, Inc., as contained in the Unit Price Section of the book entitled "Means Facility Cost Data." D's Exhibit 1 at F.3 B.
 4. The coefficient factor is composed of three subfactors: (1) the means subfactor, (2) the indirect subfactor, and (3) the base profit subfactor. Each subfactor is then broken down into specified components. D's Exhibit 1 at F.3 B.
 5. For each task order, NASA issued a Request for Proposal to B&R. B&R then completed only the Price Proposal Memorandum portion of the form, identifying its initial proposed price. D's Exhibit 2 at ¶ 4.
 6. In support of the initial proposed price for a task order, B&R submitted a detailed estimate of the costs to perform the task order. D's Exhibit 2 at ¶ 6. The price proposals contained B&R's costs for material, labor, subcontractor efforts, various overhead, and general and administrative costs. Id. The pricing transmittals identified the precise overhead coefficients and multipliers used to calculate B&R's costs to perform each modification. Id.

7. NASA would then evaluate the proposed costs, and would record significant findings relating to those costs on a single form sheet titled "Proposal Modification Review Sheet." D's Exhibit 2 at ¶ 5. Those findings were recorded prior to making the final decision to award the contract to B&R. Id.
8. B&R would sometimes propose modifications to delivery orders, or request an equitable adjustment pursuant to the Changes Clause of the contract. D's Exhibit 1 at I.2. Procurement officials would then evaluate the proposed modifications and would prepare change order recommendations. D's Exhibit 2 at ¶ 7.
9. NASA limits its access to backup records of task/delivery order modifications to procurement officials, the support contractor, and government advisors. Id. at ¶ 8.
10. On December 9, 1998, H. Paul McCoy ("McCoy"), Project Manager at Madison Mechanical, submitted a request for information to NASA's Contracting Officer, Donna Olsen. McCoy sought information relating to B&R's work releases. D's Exhibit 4. These releases were identified as WR 6344- Chill Water, WR 6456- Steam Project, WR 4245- Towers, and WR 5122- Manhole 5 & 6. Id. Specifically, McCoy sought the contract modification and all backup for the four work releases, B&R's proposed modifications, and any correspondence related to the above modifications. Id. This request for information was interpreted as a request under FOIA and it was forwarded to the FOIA office. D's Exhibit 3 at ¶ 3.
11. In March 1999, Brian Waagner ("Waagner") of the law firm of Wickwire Gavin submitted a request for information seeking similar documents as Madison Mechanical. D's Exhibit 4a.
12. In a letter dated April 1, 1999, Janet Ruff, FOIA Officer for NASA, responded to Madison

Mechanical's request for information. D's Exhibit 5. In that letter, she provided the agency's interpretation of Madison Mechanical's request and stated that the request for "contract modification" would be treated as a request for task orders issued under NAS5-35157. Id. at 1.

13. Consequently, NASA's search produced 450 separate records associated with 68 delivery order modifications that were potentially responsive documents. D's Exhibit 2 at ¶ 3; D's Exhibit 3 at ¶ 7. Those documents fell into four categories: (1) price proposal memoranda, (2) pricing transmittals of detailed cost estimates, (3) proposal/modification review sheets, and (4) planning and evaluation memoranda. D's Exhibit 2 at ¶¶ 4-7. B&R consented to the release of the initial and final delivery order amounts. D's Exhibit 6.
14. In response to the FOIA request, NASA released copies of the final delivery orders under work requests 5122, 5245, 6344, and 6456. These delivery orders listed the final estimated cost negotiated by the government and the contractor. D's Exhibit 3 at ¶ 7.
15. NASA withheld documents identified as contractor pricing transmittals and cost proposals, as well as cost and pricing information included in B&R's value engineering change proposals, citing FOIA exemption (b)(4). D's Exhibit 3 at ¶¶ 9, 11, 12.
16. Waagner submitted an appeal of NASA's initial determination of the Madison Mechanical request. Additionally, Waagner appealed what he identified as NASA's failure to respond to his March 3, 1999 request. D's Exhibit 7.
17. J.P. Dailey ("Dailey"), Associate Deputy Administrator of NASA, issued NASA's final determination on May 28, 1999. The initial decision was affirmed in part and reversed in part.

D's Exhibit 8. The final determination stated that the agency was not required to produce a Vaughn Index during the administrative process, but that the agency had to inform the requester of the estimated volume of denied information, the reasons for denial, the right of appeal, and the name and title of each person responsible for the denial. Id.

18. Dailey also determined that specific portions of 38 additional documents, which reflected the government's requests for price proposals, could be released. D's Exhibit 8 at 4.

ANALYSIS

Legal Standard For Summary Judgment In A FOIA-Review Case

Summary judgment may be granted when the pleadings and evidence demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). By its very terms, the standard set forth in Fed. R. Civ. P. 56(c) provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The adverse party must show, by affidavit or otherwise provided in Fed. R. Civ. P. 56(e), specific facts which set forth a genuine issue for trial. Id. at 248; Burke v. Gould, 286 F.3d 513, 517 (D.C. Cir. 2002).

A genuine issue of material fact is one which would change the outcome of the litigation. Anderson, 477 U.S. at 248. The judge's function at the summary judgment stage is to determine whether a genuine issue exists for trial. Id. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party such that a jury could return a verdict for that party. Id.; First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968).

To be entitled to summary judgment on a FOIA claim, the agency must also prove that each document was either produced, not withheld, unidentifiable, or exempt from disclosure. Weisburg v. DOJ, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, the agency may rely on affidavits or declarations and other evidence by the agency. FED. R. CIV. P. 56(e); Center for International Environmental Law v. Office of U.S. Trade Representative, 237 F.Supp. 2d 17, 23 (D.D.C. 2002)(noting that the affidavits or declarations must describe "the documents and justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record or by evidence of agency bad faith."); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). See also Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973). The government bears the burden of proving that the withheld documents fall within a FOIA exemption. Mead Data Cent., Inc. v. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977). Moreover, summary judgment is only proper, after construing all the evidence in the light most favorable to the requester, if no genuine issue of material fact exists. Piper & Marbury, L.L.P. v. US Postal Serv., 2001 U.S. Dist. LEXIS 2492, at *4 (D.D.C. March 5, 2001).

Vaughn Index

FOIA creates a statutory right for citizens to access government information. The central purpose of the statute is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" through the disclosure of government documents. Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976)(citation omitted). In accordance with its broad policy, FOIA instructs the government to release those documents unless they fall within one of the statutory exemptions. 5

U.S.C.A. § 552(b) (1994).

In order for this court to conduct a meaningful review of the government's claimed exemptions, the D.C. Circuit has held that "the Act also requires an agency in possession of material it considers exempt from FOIA to provide the requestor with a description of each document being withheld, and an explanation of the reason for the agency's nondisclosure." Animal Legal Defense Fund, Inc. v. Dep't of Air Force, 44 F.Supp. 2d 295, 298 (D.D.C. 1999)(citing Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996)). Thus, the Vaughn index and "the agency affidavits must . . . disclos[e] as much information as possible without thwarting the exemption's purpose." King v. U.S. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987). "The agency must provide a Vaughn affidavit explaining its reasons for withholding the documents so as to alert the FOIA requester to the nature of the documents and the claimed exemptions and allow the requester to challenge the agency's assertions." Spirko v. U.S. Postal Serv., 147 F.3d 992, 997 (D.C. Cir. 1998). In its reply to NASA's motion for summary judgment, Madison Mechanical provided a copy of the Vaughn Index originally submitted to the United States District Court for the Eastern District of Virginia. P's Exhibit 6. NASA's Vaughn Index briefly outlines the documents which have been withheld or indicates the lines which have been redacted, citing the corresponding FOIA exemption. Id. After perusing the defendant's Vaughn Index, I find there is insufficient detail to make a ruling either for or against disclosure. Therefore, I recommend ordering the government to produce a Vaughn Index that complies with the requirements set forth in Vaughn v. Rosen and its progeny.

FOIA Exemption (b)(4)

FOIA Exemption (b)(4) provides that an agency may withhold from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C.A. § 522(b)(4) (1994). Whether such information may be withheld under this exemption depends upon whether it was provided to the government voluntarily or under compulsion. Judicial Watch, Inc. v. U.S. Dep't of Commerce, 83 F.Supp. 2d 105, 110 (D.D.C. 1999). If the information was provided to the government voluntarily, then the standard in Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992), applies. However, if the information was required to be submitted to the government, then the test in National Parks and Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974), applies. In Morton, the D.C. Circuit held that "commercial or financial matter is 'confidential' for purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Morton, 498 F.2d at 770 (footnote omitted). Madison Mechanical is specifically seeking pricing information which was provided by B&R to NASA in connection with the selection process for minor construction contracts. NASA invoked FOIA Exemption (b)(4) in order to shield those documents from disclosure. Because submission of this information is a mandatory prerequisite to selection for the contracts, I must determine whether any genuine issues of fact exists as to whether the disclosure of the documents will cause harm to either NASA or to B&R.

NASA is primarily withholding cost and pricing information "based upon the fact that disclosure

would cause substantial harm to the competitive position of [B&R]." Motion to Dismiss, Or Alternatively, For Summary Judgment ("NASA Mot.") at 17. Specifically, NASA argues that a "requester could use the Means [Facility Costs Data] in combination with the overhead coefficient and multipliers to derive [B&R's] pricing methods." Id. at 18. In turn, Madison Mechanical objects to this reasoning and instead argues that the fears of competitive harm are "unfounded and speculative." Cross Motion for Summary Judgment ("Cross Mot.") at 11. The only evidence of substantial harm presented by NASA is contained in the affidavits of Donna M. Olsen, a contract specialist in the Procurement Operations Division, and Janet K. Ruff, a Public Affairs Officer at NASA. D's Exhibits 2 & 3. Both affidavits provide only conclusory statements that disclosure of the pricing information would cause substantial, competitive harm to both NASA and B&R. D's Exhibit 2 at ¶ 6; D's Exhibit 3 at ¶ 14. B&R presented even less evidence in support of its FOIA Exemption (b)(4) claim. Mysteriously, B&R merely submitted a brief letter stating that the information was deemed to be confidential business information. D's Exhibit 6. Based upon the evidence before me, I find that there is nothing in the record which would allow any reasonable finder of fact to conclude in either party's favor-- that the pricing information would cause substantial harm to the parties or that it would not. Therefore, I will recommend that defendant's motion for summary judgment based upon FOIA Exemption (b)(4), and plaintiff's cross motion for summary judgment thereto, both be denied. Instead, I recommend that an evidentiary hearing be held on the issue.

FOIA Exemption (b)(5)

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C.A. §

552(b)(5). It further protects information "normally privileged in the civil discovery context," as well as shielding the deliberative process itself from disclosure. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp. 2d 19, 35 (D.D.C. 2000). The purpose of the deliberative process privilege is to promote the free flow of opinions and recommendations without the fear of future public criticism. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). In furtherance of this objective, "the courts have allowed the government to withhold memoranda containing advice, opinions, recommendations, and subjective analysis." Heggstad v. U.S. Dep't of Justice, 182 F.Supp. 2d 1, 7 & n.4 (D.D.C. 2000)(quoting Julian v. U.S. Dep't of Justice, 806 F.2d 1411, 1417 (9th Cir. 1986), *aff'd* 486 U.S. 1 (1988)). However, in order for FOIA Exemption 5 to apply, the documents must be both predecisional and deliberative. See Tax Analysts v. I.R.S., 117 F.3d 607, 616 (D.C. Cir. 1997).

In this case, NASA argues that the proposal/modification review sheets include agency employee's evaluations of the proposed costs. NASA Mot. at 25. Moreover, NASA asserts that the employee's findings were recorded prior to deciding which contractor to award the task order and that the findings were not part of the final decision to award the contract. Therefore, NASA argues those documents are exempt under the deliberative process privilege. Id. at 25-26. NASA has the burden of proving that the documents qualify under FOIA Exemption 5. Yet, the two affidavits from NASA employees and copies of correspondence between Waagner and NASA's FOIA office do not provide sufficient detail explaining why the privilege applies. As I stated above, without submission of a proper Vaughn Index or the submission of the proposal/modification review sheets and evaluation memoranda for my *in camera* inspection, it is impossible for this Court to make an independent determination of the

validity of the claimed exemption. See Trans Union, L.L.C. v. Fed. Trade Comm'n, 141 F.Supp. 2d 62, 67 (D.D.C. 2001)(holding that the Court had exercised its discretion and examined *in camera* the redacted documents so that its decision was not based on affidavits, but rather an independent assessment of defendant's claim of FOIA Exemption 5). Thus, I will recommend that defendant's motion for summary judgment based upon FOIA Exemption (b)(5), and plaintiff's cross motion for summary judgment thereto, both be denied and that the documents be made available to the Court for an *in camera* inspection.

The Requirements of Federal Rule of Civil Procedure 56(e)

Plaintiff argues that the Olsen and Ruff affidavits are insufficient as a matter of law for their failure to comply with Rule 56(e)'s requirement that a declaration filed in support of a summary judgment motion "shall be made on personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 56(e); Cross Mot. at 4-6. A declarant in a FOIA case satisfies Rule 56(e)'s personal knowledge requirement when "in his declaration, [he] attest[s] to his personal knowledge of the procedures used in handling [a FOIA] request and his familiarity with the documents in question." Spannus v. Dep't of Justice, 813 F.2d 1285, 1289 (4th Cir. 1987). See also Cucci v. Dep't of Drug Enforcement Admin., 871 F.Supp. 508, 513 (D.D.C. 1994). At first glance, the affidavits appear to have been made by NASA employees involved in the FOIA investigation. However, neither declaration includes a concise statement attesting that the facts contained therein are based upon personal knowledge. In order to fully comply with the strictures of Rule 56(e), I recommend that defendant submit revised affidavits which fully and precisely state the declarant's basis of personal knowledge of the FOIA investigation and the documents in question.

CONCLUSION

The evidence here is insufficient to justify judgment as a matter of law for either side. Accordingly, I will recommend that an evidentiary hearing be conducted in order to determine whether the defendant has met its burden of establishing the applicability of the FOIA exemptions to the withheld documents. See Athridge v. Rivas, 312 F.3d 474, 478 (D.C. Cir. 2002). I further recommend that the proposal/modification review sheets be made available to the Court for an *in camera* inspection and that defendant be ordered to submit revised affidavits in which the declarants state fully and precisely the bases of their personal knowledge. Additionally, I recommend that defendant be ordered to submit a Vaughn Index that complies with the requirements set forth in Vaughn v. Rosen and its progeny.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District of Columbia adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: